

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENDRICK JAMEL COLLIER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38874

FILED

OCT 18 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
JUNIOR DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On November 4, 1998, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon and one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole and concurrent terms totaling 106 months to 480 months. This court dismissed appellant's appeal from his judgment of conviction.¹

On May 3, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

¹Collier v. State, Docket No. 33311 (Order Dismissing Appeal, August 11, 2000).

conduct an evidentiary hearing. On February 6, 2002, the district court denied appellant's petition.² This appeal followed.

In his petition, appellant raised numerous claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.³ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁴

First, appellant claimed that his trial counsel were ineffective for failing to: (1) develop and pursue a viable theory of defense, (2) conduct an adequate investigation, (3) interview and investigate potential defense witnesses and prosecution witnesses, (4) use compulsory process to obtain witnesses on behalf of the defense, (5) protect and preserve

²The November 6, 2001 minutes indicate that the district court received responses to the petition submitted by appellant's former trial counsel. These responses are not a part of the record on appeal. This court recently held that a petitioner's statutory rights are violated when the district court improperly expands the record with the use of an affidavit in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the responses submitted by appellant's former trial counsel, appellant was not prejudiced by the error because appellant was not entitled to an evidentiary hearing on the claims that he raised in the petition.

³Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 697.

evidence that would cast doubt upon the testimony identifying appellant, (6) object at sentencing, (7) prepare and present mitigating evidence and witnesses at sentencing, (8) provide appellant with discovery materials, (9) formalize discovery, (10) seek an advisory verdict, (11) properly move for a new trial, and (12) provide appellant with the defense investigator's results. Appellant did not offer sufficient specific facts in support of these allegations.⁵ Therefore, appellant failed to demonstrate that the performance of counsel was deficient or that he was prejudiced. Thus, appellant failed to demonstrate that his counsel were ineffective.

Second, appellant claimed that his trial counsel were ineffective for filing a motion for admission of expert opinion testimony regarding polygraph results. Appellant claimed that this motion was a waste of the district court's time because the State did not stipulate to the results of a defense-requested polygraph. Appellant failed to demonstrate that he was prejudiced as a result of the filing of this motion. Thus, appellant failed to demonstrate that his counsel were ineffective.

Third, appellant claimed that his trial counsel were ineffective for failing to file a motion for specific discovery of scientific test results. Appellant claimed that his hands were bagged to preserve evidence of gunshot residue and that the results of these tests were not provided. Appellant claimed that this evidence would have proven that he was not the third gunman. Appellant failed to demonstrate that the performance of his counsel was deficient or that he was prejudiced. There is nothing in the record to support appellant's assertion that his hands were bagged;

⁵Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

thus, his counsel were not ineffective for failing to discover this evidence.⁶ Moreover, failure to discover this alleged evidence would not render the jury's verdict unreliable because the State proceeded on alternative theories that included appellant aiding and abetting the other men in the shooting. Thus, appellant failed to demonstrate that his counsel were ineffective.

Fourth, appellant claimed that his counsel were ineffective for failing to consult with experts regarding the different types of spent cartridges found at the scene. Appellant believed that an expert might have been able to show that different spent cartridges could have been fired from the same gun, thus eliminating the possibility of a third gun. Appellant failed to demonstrate that he was prejudiced by the performance of counsel. Failure to discover this alleged evidence would not render the jury's verdict unreliable because the State proceeded on alternative theories of liability that included aiding and abetting. Moreover, testimony was presented that various fragments and bullets were identified to have been associated with at least two different weapons. Thus, appellant failed to demonstrate that his counsel were ineffective.

Fifth, appellant claimed that his counsel were ineffective for failing to adequately investigate and interview Cherrie Smith about the man she observed kicking spent cartridges at the crime scene prior to the arrival of the police. Appellant asserted that this evidence may have

⁶Appellant testified at trial that he was handcuffed upon his detention by the police. Appellant did not testify that his hands were bagged. The arresting officer testified that he placed appellant in handcuffs but did not indicate that appellant's hands were bagged.

supported his theory that another person was the third gunman. Appellant failed to demonstrate that the performance of his counsel was deficient or that he was prejudiced. Witnesses to the shooting observed the shooters arriving and leaving in a U-Haul truck. Appellant was identified by one of the victims on the night of the shooting and at trial as one of the individuals in the U-Haul truck. Cherrie Smith and several other witnesses testified that one or more individuals were observed kicking the spent cartridges after the shooting but prior to the arrival of the police. Cherrie Smith, however, did not observe the man kicking the spent cartridges until after the U-Haul truck carrying the shooters had left the crime scene. Therefore, appellant failed to demonstrate his counsel were ineffective.

Sixth, appellant claimed that his trial counsel was ineffective for characterizing his prior conviction at trial as a felony when in fact it was a gross misdemeanor. Appellant claimed that his trial counsel should have known that his prior conviction was not a felony. Appellant failed to demonstrate that this error rendered the jury's verdict unreliable. Appellant raised the underlying claim regarding the mischaracterization of his prior conviction in a prior motion for a new trial. On appeal, this court concluded that the district court did not abuse its discretion in denying his motion for a new trial in light of the fact that appellant had lied to the police about his knowledge of the shooting and the other evidence of his guilt. Further, although appellant's counsel asked the question regarding the prior felony conviction, appellant himself answered affirmatively that he did have a prior felony conviction. Appellant did nothing to correct the mischaracterization of his criminal record during

the trial. Thus, we conclude that appellant failed to demonstrate that his counsel was ineffective.

Next, appellant raised several claims of ineffective assistance of appellate counsel. “A claim of ineffective assistance of appellate counsel is reviewed under the ‘reasonably effective assistance’ test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).”⁷ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁸ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁹ “To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.”¹⁰

First, appellant claimed that his appellate counsel was ineffective for failing to research the proper case law and authorities regarding his “mere presence” theory. Appellant failed to provide any specific facts or argument in support of this claim.¹¹ Thus, appellant failed to demonstrate that his counsel was ineffective.

Second, appellant claimed that his appellate counsel failed to argue that the district attorney knowingly allowed the introduction of false testimony at trial and that this violated his due process and fair trial rights. Appellant claimed that because a witness’s statement to the police

⁷Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

⁸Jones v. Barnes, 463 U.S. 745, 751 (1983).

⁹Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹⁰Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹¹Hargrove, 100 Nev. 498, 686 P.2d 222.

differed from her testimony at trial that the testimony at trial was false. Appellant further claimed that the witness's testimony was false because it differed from the testimony of other witnesses. Appellant appeared to suggest that this witness identified him as the third gunman. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Appellant failed to demonstrate that the State knowingly presented false testimony and that any rights were violated by the introduction of this witness's testimony. The witness was questioned about the inconsistencies between her statement to the police and her trial testimony. The witness explained that in her statement to the police she had only put down what she had heard and not what she had seen because she was afraid and did not want to get involved. The witness did not identify appellant as the third gunman, but rather testified that she observed three gunmen shoot the victims. The jury was presented with the differing observations of the witnesses to the shooting. Thus, appellant failed to demonstrate that his counsel were ineffective.


Third, appellant claimed that his appellate counsel was ineffective for failing to argue that he was denied the right to a fair and impartial sentencing hearing. Appellant claimed that the district court was presented with and relied upon erroneous information at trial and in the presentence report that his prior conviction was a felony when in fact the prior conviction was a gross misdemeanor. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Appellant failed to demonstrate that the district court relied upon impalpable or highly suspect evidence in sentencing appellant.¹² The

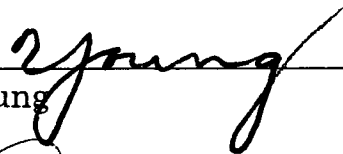
¹²Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

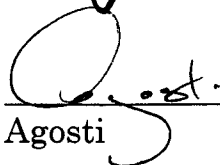
district court was aware at the sentencing hearing that appellant did not have a prior felony conviction. Thus, appellant's counsel were not ineffective.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁴


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Kendrick Jamel Collier
Clark County Clerk

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.